United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1042

No. 77-1042

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

VIRGIL WHITE,

Defendant-Appellant.

On Appeal From the United States
District Court
For the Southern District of New York

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED

The following questions are to be decided on this appeal:

1. Did the Government's proof show several conspiracies rather than a single conspiracy, thereby constituting a prejudicial variance?

2. Did the Court err in failing to give the jury guidance on what constitutes a single versus multiple conspiracy?

3. Did the Court err in permitting the use of Grand Jury testimony as evidence in chief?

STATEMENT PURSUANT TO RULE 28[3]

Appellant, VIRGIL WHITE, appeals from a judgment of conviction from the United States District Court, Southern District of New York [Connor, J.] convicting him of conspiracy to sell and distribute narcotics and of the substantive charge of distributing the narcotics in violation of 21 U.S.C.812 and 841.

Appellant was sentenced to a term of imprisonment of two years, eighteen months of which was suspended. He was additionally sentenced to a special parole term of three [3] years.

Appellant was indicted in a seven count indictment with eight other defendants, to wit: Raymond Anderson, Joann Jones, Arletha Franklin, Robert Moore, Bernard Johnson, Marx Jackson, Joe King and Edith Rivers, a/k/a Graves. Only Joann Jones, Arletha Franklin, Marx Jackson and appellant, VIRGIL WHITE, proceeded to trial.[1/]

Mr. White was named in Counts 1 [Conspiracy] and 5 [Possession of 1/8 kilogram of Heroin].

1/ Anderson, Johnson and King are fugitives. The charges against Moore were dismissed prior to trial. Rivers pleaded guilty to conspiracy.

FACTS

Introduction

The government's presentation of the facts of this case are framed on the theory that the defendants and co-conspirators were engaged in a single conspiracy to distribute heroin and cocaine to various cities up and down the Eastern seaboard. The source of the drugs was alleged to be Raymond "Slim" Anderson, whose base of operations was centered in New York City. The chief courier and distributor was alleged to be the unindicted co-conspirator, Earl Rivers, who was assisted by his common law wife, Edith Rivers, a/k/a Graves, defendants Joann Jones and Arletha Franklin, Pat Smith and River's sister-in-law, Delzora Graves. The ultimate distributees were Robert [Bobby] Moore, bulk purchaser of heroin in Williamsport, Pennsylvania, VIRGIL WHITE and Bernard Johnson in Atlanta, Georgia and Marx [Moxie] Jackson in Washington, D.C.[2/] In point of fact, the proof, taken at its most favorable to the government, clearly showed a series of unrelated incidents involving exchanges of heroin and cocaine from several sources to individuals having no communal interest with each other, no

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2/ "A" references are references to Joint Appendix. "T" references are references to Transcript.

conspiratorial connection, and indeed no knowledge of each others business affairs except on the most transient level. There was no single business venture, no common aim and no "mutual dependence and assistance" between the various satellite groupings. In short, the government's view of the defendants' relationships to each other as that of a single business venture was a product of the government's imagination.

Once more this Court is asked to set aside convictions based upon a prosecutorial format which flies in the face of the clear and oft repeated admonitions of this Court that this type of trial is fundamentally unfair. United States v. Sperling, 505 F.2d 1323 [1974]; United States v. Bertolotti, 529 F.2d 149 [1975]; United States v. Borelli, 336 F.2d 376 [1964]. The defense of a conspiracy trial raises problems nowhere else existing and such a trial permits the use of procedures otherwise condemned in the Courts of Western Jurisprudence. The dangerous and unfair use of hearsay testimony with all the consequent dangers to a defendant, are present; the use of informer testimony with the opportunity placed in the hands of amoral, desperate individuals to condemn and destroy all those they dislike or may find useful to condemn with a word,is more of a danger to our security and liberties than any other single instrument in the government's prosecutorial arsenal. It has the most chilling effect upon our free association, our freedom of speech and our freedom to explore new and different thoughts, ideas and lifestyles.

The Rivers - Anderson Connection

In 1970, Launey Earl Rivers was convicted of possession of counterfeit bills and sentenced to three years in the Federal Correctional Facility at Lewisburg and subsequently Allenwood, Pennsylvania. While at Allenwood, the 33 year old Rivers met Raymond Anderson known universally as "Slim." A "pretty strong relationship" [T-332] developed between them based upon the relatively more educated Earl helping "Slim" in his correspondence with the outside world. As Rivers put it:

> "The man was ignorant; he couldn't read and write. So I used to read and write for him..."[T-3322

"Slim" was released on September 19, 1972, two days before Earl and upon parting, "Slim" gave Earl his telephone number in New York and told him to "stay in touch" when he gets out. Promises were exchanged and "Slim" stated that he would "look him up" within a few days of his release [T-333]. Two days after Earl's release he received a call from "Slim" to come to a restaurant in New York to purchase 1/8 kilogram of heroin. Earl ultimately arrived in New York, purchased the package for $7,500.00, $5,000.00 of which was paid in cash [T-335].

Other Sources

At about the same time Earl was approached by two individuals from the Washington, D.C. area named William Butler and Walter Burman [T-625] concerning "going into the drug business." During the balance of 1972 and much of 1973, he received drugs from Butler and Burman which he distributed for them. In addition to "Slim", Butler and Burman, Rivers also received drugs from other sources during the period of the conspiracy. There was Mermie Jenkins from Baltimore during 1973 [T-649a]. There was Charlie Burman from Washington ["Walter Burman's brother"]. There was "Peewee" Hammond from New York in late 1972 [T-638]. There was Philip Garretson and Bo Williams in New Jersey [T-639]. It should be noted that there is no evidence that any of these sources of heroin and cocaine for Rivers knew of any of the others nor had any financial interest in how the others fared. In point of fact, one could reasonably infer that any one of the suppliers would have benefited from the demise or bankruptcy of any of the other suppliers thereby acquiring a more competitive posture in the drug market by removing unwanted competition.

Background and Friends

Rivers was brought up in Lakewood, New Jersey where his mother owned a home. When he was released from jail in 1972 he took up residence in Washington, D.C. but would visit his family in Northern New Jersey where he would leave the proceeds of his drug sales with his mother and would occasionally leave caches of drugs with his brother [T-95] in his home in Jersey City. Prior to his arrest for counterfeiting in 1970, he engaged in drug trafficking in most of Northern and Central New Jersey, including Asbury Park, Lakewood, Tom's River, Long Branch and Freehold [T-616]. Early in 1973 he met defendant Marx Jackson [Moxie] in Washington. Jackson frequently visited the sister of a long-time friend of Rivers, Joe King. On one occasion he was introduced to him but was never close to him. As described in the transcript, Rivers had a "light social" relationship with Jackson "playing a few numbers with him at times very, very seldom" [T-676]. While living in Washington, Rivers met defendant, Edith Graves [Angel] while she was working in a "Martinizing Cleaners where he used to take his clothes to be cleaned" [T-336]. They began seeing each other regularly and in September, 1973 they both moved to Williamsport, Pennsylvania where they began living together. While in

Williamsport, Rivers renewed past relationships with defendants Arletha Franklin, "Bobby" Moore and Joann Jones.

Rivers first met Arletha Franklin in 1972 through her cousin Inez. Inez met him while visiting an inmate at Lewisburg Prison while Rivers was serving time for counterfeiting. Bobby Moore was an old acquaintance of his from Lewisburg as well, and Joann Jones was a friend's girlfriend who Rivers had previously known in New Jersey.

During Rivers stay in Washington from September, 1972 until his move to Williamsport in September, 1973, he had only one narcotics transaction with "Slim" Anderson, that being the $7,500.00 purchase of 1/8 kilogram of heroin immediately after his release from Allenwood. From January, 1973 - September, 1973, he was dealing in narcotics from his Baltimore sources and disposing of it in the Baltimore - Washington area, with occasional side trips to New Jersey. None of his 1973 sources were named as co-conspirators [T-337].

Business Transactions

Shortly after Rivers and "Angel" settled down in Williamsport, "Slim" called him. The record does not indicate how Anderson had known of Rivers' move to Pennsylvania. Indeed Rivers was surprised that "Slim" knew where he was [T-339] and

was possibly unpleasantly surprised inasmuch as he still owed Anderson $2,500.00 from the drug transaction in 1972. Anderson proposed more regular transfers of drugs which Rivers agreed to. A pattern soon emerged whereby Rivers and/or Angel, Arletha Franklin, Joann Jones, Pat Smith or Delzora Graves [Angel's sister] would drive to New York, pick up heroin and cocaine at "Slim's" Restaurant between 118-119th Street in Manhattan and return to Williamsport where the heroin would be cut at Rivers' apartment [T-344] and "stashed" at Arletha Franklin's apartment. Previously, some heroin had been stored at Joann Jones' place [T-338] or at his brother's home in New Jersey but Jones fell into disfavor with Rivers when it became obvious that she was stealing from him. Bobby Moore would act as sales manager and sell the drugs using Arletha Franklin's stash as his supply source. In exchange for Arletha's services, she was paid $350.00 per week which was later increased to $500.00 [T-346]. Between November, 1973 and March, 1974, Rivers took approximately 10-12 trips to New York for drugs [T353-4].

Meeting with White

In December, 1973 Rivers received a call from an old friend named Douglas Thomas. They had grown up together in New

Jersey but at the time Thomas was living in Baltimore and Rivers was in Williamsport [T-496]. At the time Thomas was not dealing in drugs [T-500]. Thomas gave Rivers the name and phone number of VIRGIL WHITE and told him to call him. The record is devoid of any connection between Thomas and any of the other defendants. Indeed, Thomas is not named as a co-conspirator or defendant.

Rivers made two trips to WHITE who lived in Atlanta, Georgia; once in late December and a second trip in early January. During the first trip he was accompanied by his wife, Edith, a friend of his from Baltimore, John Green and Green's girlfriend named "Pat." Green's sole purpose in going to Atlanta was to keep Rivers company and to make use of a stolen credit card [T-366,367] in the name of Jason Limen [T-377]. The trip became a pleasure trip when Green's girlfriend decided to join them. Rivers traveled to New York, picked up 1/8 kilogram of heroin from Anderson and then returned to Williamsport, Pennsylvania by way of Baltimore and Washington where some heroin was dropped off at Mermie Jenkins to repay a past loan [T-369]. From Williamsport, accompanied by Angel, John Green and Pat, they drove through the night to Atlanta, "snorting cocaine all night long" [T-370][T-80].

Upon arrival in Atlanta, WHITE was contacted and heroin was exchanged, cut and packaged with the help of WHITE's alleged partner in the drug business, Bernard Johnson, his wife Connie, Pat, Earl, Angel and John Green. Some money was paid by WHITE and Pat was sent off to Florida to visit her mother because instead of packaging the heroin, she was "sniffing up the dope." [T-381] Green took some heroin to Arletha Franklin in Williamsport at the request of Rivers and then returned to Atlanta. Presumably, Arletha's stash was very low and needed replenishing [T-379]. WHITE paid Rivers $2,000.00 on account and Rivers, Angel and Green went back to Washington where some $3,000.00 was given to his mother-in-law. They then spent the night in debachery. As Rivers put it, "I spent $1,400.00 having fun" [T-385]. Significantly, there is no evidence that "Slim" Anderson had any business contact with Johnson, Green or "Pat." Indeed, it is unlikely that he even knew them. His interest in Rivers extended solely to whether Rivers could pay for heroin and cocaine sold to him. Indeed, Rivers had a running account with Anderson but payment was not contingent upon Rivers fortunes in selling the narcotics for a good or bad price. Nor did he share in any profits or losses which Rivers suffered or managed to obtain as a result of astute business acumen or the unfortunate vicissitudes of everyday business life.

John Green was from Baltimore and was an associate of Rivers for some 5 -6 months before the Atlanta trip. He had "done some business" with Earl previously, but was not an employee of Rivers.

In January, 1974, a second trip was made to Atlanta. This time by Rivers and Angel alone and their purpose was to sell WHITE and Johnson more drugs [T-399]. Rivers picked up heroin in New York from "Slim" and delivered it to WHITE. WHITE paid $1500.00 on account. Once again the heroin was cut and packaged in Atlanta with the help of Rivers, Angel, Bernard Johnson and WHITE. Earl and Angel thereupon drove back to Washington, left some money with his mother-in-law and went to an after-hours club where he met Marx Jackson, accidentally.

Rivers and Moxie

Rivers had in his possession one ounce of cocaine "for funning" and offered to give "Moxie" some for his personal use. "Moxie" indicated he did not indulge [T-401] personally but he could sell it for him. Jackson took the cocaine and disappeared briefly. When he returned he told Rivers that he could not sell it but Rivers noted that the cocaine, upon being returned to him "had been tampered with."

However, he philosophically accepted the transgression by "Moxie " [T-402] without making an issue of it. Rivers had previously delivered some heroin and cocaine to Moxie as an accomodation to Anderson and received $200.00 from Jackson for his trouble [T-291]. Apparently, Jackson and Anderson had done some business in the past. Coincidentally, Rivers had met Jackson independently of his association with Anderson. On one prior occasion Rivers had met Moxie in Washington while accompanied by "Slim." Anderson had been recommended by Rivers to Joe King as a source of drugs. Anderson sold King drugs after being assured by Rivers that King could be trusted. Unfortunately, King failed to make payment to Anderson and "Slim" travelled to Washington with his bodyguard "Jack" to see about payment. By pre-arrangement he met Rivers and while riding with him on the streets of Washington they met Moxie. "Slim" and Moxie had a brief conversation concerning drugs, having apparently been previously acquainted.

Following his second trip to Atlanta, Rivers' relationship with WHITE noticeably cooled. One can infer that Rivers was dissatisfied with WHITE's payment habits or lack thereof [T418-419] and was also unhappy about the fact that his profit/risk ratio with WHITE was likely to make future deals unprofitable [T-413] as Rivers testifies,

> "So he told me that he was ready, you know, he was ready for that thing again... So then--- personally, myself, I said, Well this is getting to be too much for me because I ain't making no money for this, you understand, running up and down the road with a whole lot of narcotics and what not." [T-412-3]

Nevertheless, WHITE and Johnson came to Wlliamsport to pick up some heroin from Moore and Rivers after first sending a $1000.00 payment on account.

In early 1974, WHITE and Rivers travelled to New York together to obtain some heroin with the understanding that Rivers was to make the buy. On that occasion WHITE gave Rivers some money who in turn purchased drugs from Anderson for both WHITE and Jackson. Although WHITE was introduced to Anderson and some pleasantries were exchanged, it was clear that Anderson was dealing with Rivers and not with WHITE. Indeed, prior to WHITE's trip to New York, he had spoken to Rivers who asked him to pick up some money from defendant, Marx Jackson in Washington. Apparently Jackson owed Anderson for delivered drugs and since both WHITE and Rivers were going to New York, convenience would be served and Jackson would save himself a trip if WHITE were given the money. Prior to this occasion WHITE and Johnson had never met Jackson. Rivers told Jackson to expect WHITE and Johnson but when they arrived for the money Jackson in effect told them to mind their own business.

Jackson so offended WHITE and Johnson that Johnson reached for his gun but only through a supreme effort at self-control refrained from calling the gentlemen to account [T-404-406].

Significantly, WHITE never had any narcotics dealings with Jackson, Arletha Franklin, Joann Jones or "Slim" Anderson [at least not directly]. His contact with Jackson consisted of the one accomodation offer [supra p.13] which was refused. His alleged brief meeting with Moore is thrown into serious question when Moore was unable to identify WHITE at the trial [T900-901]. Indeed, the only person Moore recognized when he testified, was Marx Jackson and even then was not able to recall his name. Likewise, Delzora Graves was unable to identify Arletha Franklin reflecting the very casual and transient relationships existing between the various parties to this alleged conspiracy. The entire fact pattern as it emerged from the trial testimony was that of incidental drug transactions between people who may have known each other but were not involved in a common scheme or business association which would rise to the level of a conspiracy. To be sure there were satellite groupings in New York, Atlanta, Williamsport, Washington and Baltimore. Indeed, Rivers even sold drugs in Florida on two occasions which the government pointedly did not include in this indictment but these groupings clearly were not part of the single business association with a common goal which would raise this to the level of a single conspiracy.

Rivers Arrest

In March, 1974 Rivers was ultimately arrested by Pennsylvania authorities for possession of drugs, tried and convicted. He was sentenced to 10-30 years. Shortly thereafter he contacted D.E.A. authorities and began cooperating with the government. Thereafter, the Pennsylvania conviction was reversed and defendant was permitted to plead to a reduced charge. At the time of trial he had not yet been sentenced.

Williams' Testimony

The government called as its witness Sampson Williams who had known Moxie Jackson for some fifteen years [T-985-1044]. Williams first asserted his right against self-incrimination in refusing to testify [T-945] but when immunity was granted he asserted, to all pertinent questions, his inability to remember. The government then used his Grand Jury testimony to impeach him and indeed the Grand Jury testimony was admitted as evidence in chief. During colloquy with the Court, it became clear that the government was aware that Williams would not voluntarily testify for at least two weeks prior to the trial [T-965-978]. Counsel for defendant WHITE strenuously objected to the use of this procedural device, to get before the jury Williams' Grand Jury testimony [T-972]. The testimony as adduced tended to show

that Rivers met Williams in Washington, D.C. in 1972. That he was good friends with Moxie. That he offered to introduce Williams to Anderson [T-987]. That he was never introduced to "Slim" by Rivers because Moxie wanted to keep his source for himself [T-989].

ARGUMENT

POINT I

THE GOVERNMENT'S PROOF SHOWED SEVERAL SEPARATE CONSPIRACIES RATHER THAN ONE. THE CONSEQUENT VARIANCE PREJUDICED APPELLANT.

This conspiracy, although a narcotics trial, is properly controlled by the Supreme Court's ruling in Kotteakos v. United States, 328 U.S. 750 [1946] rather than the more recent narcotics decisions in this circuit, United States v. Sarmiento - F.2d - [decided 10/28/76 2d Cir. Docket No. 76-1113]; United States v. Tramunti, 513 F.2d 1087 [1975]; United States v. Bynum, 485 F.2d 490 [1974], vacated and remanded on other grounds 417 U.S. 903 [1974]; United States v. Cirillo, 468 F.2d 1233 [1971]; United States v. Agueci 310 F.2d 817 [1962]; United States v. Stromberg 268 F.2d 256 [1959]. The instant case falls well within the traditional "hub-spoke" pictorial pattern described in Kotteakas although as Judge Friendly indicated in United States v. Borelli:

> "As applied to the long term operation of an illegal business, the common pictorial distinction between 'chain' and 'spoke' conspiracies can obscure as much as it clarifies. The chain metaphor is indeed apt in that the links of a narcotics conspiracy are inextricably related to one another, from grower,

> through exporter and importer to wholesaler, middleman, and retailer each depending for his own success on the performance of all the others. But this simple picture tends to obscure that the links at either end are likely to consist of a number of persons who may have no reason to know that others are performing a role similar to theirs - in other words the extreme links of a chain conspiracy may have elements of the 'spoke' conspiracy." [Emphasis Supplied]

Leaving aside the semantics, any meaningful analysis of the groupings in this case would clearly show that the people named in this indictment should not properly have been tried together and that appellant's motion for a severance and his motion for a trial order of acquittal should have been granted.

Appellant, WHITE, had no agreement or conspiratorial design with any of the other defendants in this case. Indeed, WHITE, did not know any of the defendants other than Edith Rivers and then only for the single purpose of simply purchasing heroin. He had no interest in the source of this heroin, nor did he care where it came from. If "Slim" Anderson were arrested and put out of circulation, it would be of no interest to him so long as Rivers continued to supply him with drugs. There was no pooling of funds, mutual aid or assistance, common aim or goals. If Moore, Moxie Jackson,

Joe King, Joann Jones or Arletha Franklin were removed from the scene, his fortunes would in no way be affected. Indeed, the typical single source of the usual narcotics conspiracy is even missing here. "Slim" Anderson was not even the principal source of drugs. Butler and Burman, Mermie Jenkins, "Peewee" Hammond, Philip Garretson and Bo Williams also supplied drugs to Rivers. Although Rivers got the drugs he sold to WHITE from Anderson, this was merely an unimportant happenstance to WHITE. Indeed, many of the participants in this alleged conspiracy exhibited behavior inimical to the functioning of a single conspiracy. Rivers was constantly concerned about the predilection of Joann Jones to steal drugs; so much so that he stopped using her apartment as a stash. On one occasion when returning from a pick-up in New York from Anderson, he took over the driving duties from Jones because he believed her to be stealing drugs from under the dashboard of their car while he was sleeping the back seat. Likewise, Rivers believed that Moxie had stolen some cocaine from him while purporting to attempt to sell it [T-402]. Although it is not alleged that these thefts arose to the level of the Bertolotti "rip-offs" [United States v. Bertolotti 529 F.2d 149 [1975]] both in Bertolotti and in the case at bar, this type of conduct argues against the existence of a single conspiracy. Of more significance was the action of Moxie in

relation to VIRGIL WHITE and Raymond Johnson where despite advance notice Moxie refused to recognize WHITE and Johnson as part of "his organization," and indeed he would have denied the existence of any organization, when he refused to give any money to them to carry to New York for Anderson. Nor was there any lines of authority in the so-called organization. Rivers clearly stated that he did not work for Anderson [T-700]. Jackson refused even to tell co-conspirator Sampson Williams "his source of supply," hardly indicative of the existence of a single conspiracy. It is not denied that there were connections between all the parties but the connections were no more meaningful than that they were in the same business; that of trafficking in drugs. The government's case had no more prosecutorial cohesion that if it had tried all drug pushers in Harlem or Watts or Bedford Stuyvesant in a single conspiracy. There was no logical reason why the Florida grouping was not included or indeed why the Atlanta grouping was.

As in Bertolotti, supra, where this court held that the "only common factor linking the transactions was Rossi and Coralluzzo", so here the only factor linking WHITE and Johnson to Moxie Jackson and "Slim" Anderson, Sampson Williams and the entire Washington, Baltimore and Williamsport

groupings was Rivers. Remove Rivers and you have nothing but several isolated drug dealers having their own customers, their own sources and their own satellites. The tests set forth by this Court of mutual "dependance and assistance" between various groupings [United States v. Agueci, supra] or a "common aim or purpose among the participants" [United States v. Tramunti, supra] or that each party knew of their role in a larger organization [United States v. Sperling [1974] 505 F.2d 1323];[United States v. Bynum, supra] are not met in the case at bar. Appellant is mindful of this Court's recent decision in United States v. Sarmiento, supra, and of the extremely complex and sophisticated nature of the organization. However, it should be noted that the very sophistication and frequent coded telephonic conversations between the multitude of parties in that case could argue against a multiple conspiracy finding. In the case at bar, there was no such sophistication and contacts were based on normal familial and social relationships between Rivers, his wife and others in the Williamsport group. His contacts with WHITE were of a totally different kind and clearly WHITE had no contacts with the other members of the alleged conspiracy.

It seems clear that Rivers' drug dealings in 1972 and 1973 in the Baltimore-Washington area constituted a separate and distinct conspiracy. His dealings involved a

source different from the one named in the indictment. The parties involved have substantially different interests from those in Williamsport, Atlanta and Florida and the level of associations are different from those in Williamsport. Rivers' dealings with Bernard and WHITE could clearly be considered a separate conspiracy and his dealings with Arletha Franklin, Bobby Moore, Joe Green and Joann Jones, a third, separate and distinct conspiracy.

A subsidiary question exists of whether there was spillover prejudice to the appellant by the lumping of many and diverse conspiracies into a single trial. It should be noted that appellant moved for a severance before trial which was denied. Appellant is mindful of this Court's decision in United States v. Miley, 513 F.2d 1191 [1974], and the Supreme Court's decisions in United States v. Berger, 295 U.S.78 [1935] and United States v. Blumenthal, 332 U.S.539 [1947], emphasizing the importance of "numbers" in proving prejudice to any particular defendant. But as this Court said in Bertolotti, supra, quoting from Kotteakos:

> "In the final analysis judgment in each case must be influenced by convictior resulting from examination of the pro ceedings in their entirety, tempered but not governed in any rigid sense of stare decisis by what has been done in similar situations." [Emphasis Supplied] [at pg.762]

In the case at bar, prejudice can be shown to WHITE by a comparison of the past lives and conduct of WHITE and the other alleged conspirators. During the trial Rivers and the Williamsport Group was shown to be the type of individuals who were deceitful, self-absorbed, concerned only with their own welfare and totally debauched. The relating of Rivers spending of $1400.00 in one evening's "fun" with his wife must, of necessity have affected the jury's view of all those individuals connected with Rivers and his wife. The descriptions of Rivers, his wife, Green, Pat and Joann Jones snorting cocaine at every opportunity [T-80] with Arletha using her cousin's infant baby to hide narcotics [T-102] was as devastatingly prejudicial as the testimony of Edith Rivers that on a trip from New York, Franklin secreted drugs in the diapers of her cousin's infant child. This type of behavior compared to the relatively strong and devoted paternal relationship WHITE had with his own children, could be expected to have a strongly prejudicial effect on the jury as regards WHITE. Add to this the prior criminal records of the other participants as compared to the relatively crime free past of appellant, WHITE, and we have in stark relief the disadvantage WHITE was placed in by being forced to defend in the mixed trial.

Indeed, most of the principals [Anderson, Joe King, Rivers, Green and Moore] either met in prison or had recently been released from prison with the exception of WHITE. Added to the other disadvantages imposed upon a defendant in a drug conspiracy trial, the spillover effect of the character of the co-defendants and co-conspirators was insurmountable and the ultimate judgment of the jury would seem to have borne this out.

POINT II

THE COURT ERRED IN FAILING TO GIVE THE JURY GUIDANCE ON WHAT CONSTITUTES A SINGLE VERSUS MULTIPLE CONSPIRACY.

This Court has largely left the question of whether there is a multiple conspiracy to the jury. See United States v. Finkelstein, 526 F.2d 517 [1975]; United States v. Sir Kue Chin, 534 F.2d 1032 [1976]. As a practical matter the decision on severance, properly before the District Court on motion before the trial, has been governed, in effect by whether the jury believes the defendants are guilty or innocent of the substantive criminal crimes charged. Because of the inevitable tendency by most juries to be reluctant to acquit a defendant shown to be involved in the narcotics trade merely because of a misjoinder of parties special guidance and a special admonition is required by the District Court. The District Court totally failed to give the required guidance necessary for the jury to intelligently decide this issue. [See Appendix pages A-19 to A-34].

Nor does the failure to request such instruction constitute a waiver by defense counsel. Failure to give such instruction under the circumstances of this case constitutes

"Plain Error" under Rule 52[b] under the Federal Rules of Criminal Procedure. Rule 52[b] reads, as follows:

> "[b] Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

In the case at bar, the issue of misjoinder of parties was so manifestly a jury question in the context of this case that the court should have charged the jury even absent a specific request by counsel. Failure to do so affected a substantial right of appellant. This court has held that failure to instruct on an essential element of a crime invariably constitutes "Plain Error" within the meaning of Rule 52[b]. See United States v. Alsondo, 486 F.2d 1339 [1973] Cert. granted 94 S.Ct. 1932. The charge need not be detailed or extensive. This court has affirmed a simple charge such as was given by Judge Frankel in United States v. Capra, 501 F.2d 267 [1974] reversed on other grounds:

> "Count one does charge a single overall conspiracy in order to make out the first of the three essential elements on which I am now instructing you. So if the government has not established such a conspiracy, but has established only a variety of different and unconnected conspiracies among different people there would be a failure of proof as to element 1 under Count 1 and you would have to acquit on that count." [at page 3934 of court transcript]

It would appear that even in Capra the District Court was woefully inadequate in setting guidelines for the jury. In

the case at bar, even this limited instruction was absent from the court's charge. In Sarmiento, supra, a similar charge was given.[3/] In Bertolotti, a more extensive charge was given and in United States v. Borelli, 336 F.2d 817 [1962], an even more comprehensive charge was given.[4/]

3/ This court found the Sarmiento charge "succinct" [but] adequate it being enough that the court told the jury:

> "...That the government was required to prove the existence of but a single conspiracy and that each defendant's participation in this conspiracy must be determined individually by his own actions and declarations."

Even this limited charge was missing in the instant case.

4/ Judge Bonsil's charge in United States v. Borelli:

> "If you find that the government has failed to prove the existence of one conspiracy, you must find the defendant not guilty. Proof of several separate and independent conspiracies involving various of the defendants, although to violate the same narcotics laws is not proof of the single conspiracy charged in the indictment."
>
> "In determining whether there was a single conspiracy, you may consider what the evidence shows as to changes personnel and activity, but you may [3225] find a single conspiracy even though there were changes in personnel and activities, provided that you find that some of the conspirators continued throughout the life of the conspiring and that the purposes of the conspiracy continued to those charged in the indictment."

This court has repeatedly set guidelines and issued warnings to the United States Attorney concerning multiple conspiracy cases. United States v. Sperling, supra; United States v. Miley, supra. However, these warnings have generally not been heeded and the expressions of principals have generally not resulted in reversals. The law in the drug conspiracy field is fast reaching the point that anything other than de minimus transactions, anyone involved with one of the conspirators can be found to be a co-conspirator with everyone else, no matter how far removed from the core of the conspiracy or how far isolated in time or place. See United States v. Mangano [2d Cir. September 7, 1976].

But as long as the question has become a jury decision, this court should require the District Court to give proper guidance to the fact finders in each case in question.

4/ [cont'd]

> "But on the other hand, if you find that one conspiracy terminated and another one was formed you may not find a single conspiracy, even though the purposes of the conspiracies were the same and that some of the defendants were members of both." [Page 3225 of Court Record]

POINT III

THE TRIAL COURT ERRED IN PERMITTING THE USE OF GRAND JURY TESTIMONY AS EVIDENCE IN CHIEF.

The District Court should not have permitted the use of Sampson Williams' Grand Jury testimony to be used as evidence in chief. Although the testimony primarily affected defendant, Moxie Jackson, all counsel objected to its use. [T-972] Appellant, Marx Jackson, has exhaustively briefed this point and pursuant to Rule 28[i] FRAP,[5/] appellant, VIRGIL WHITE, will not argue the issue in his brief but will refer this Court to appellant Jackson's brief on the subject.

5/ 28[i] FRAP, reads as follows:

"[i] Briefs in Cases Involving Multiple Appellants or Appellees.

In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief or another. Parties may similarly join in reply briefs.

CONCLUSION

THE CONVICTION OF APPELLANT, VIRGIL WHITE, SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Respectfully submitted,

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